No. 18678

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

John William Whaley,

Appellant,

vs.

United States of America,

Appellee.

APPELLEE'S BRIEF.

Francis C. Whelan,
United States Attorney,
Thomas R. Sheridan,
Assistant U. S. Attorney,
Chief, Criminal Section,
Elmer Enstrom, Jr.,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

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APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty as charged in an indictment following a jury trial. The offense occurred in the Southern Division of the Southern District of California; the District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal from the judgment under Sections 1291 and 1294 of Title 28, United States Code.

II.
STATEMENT OF THE CASE.

The indictment in one count which is set forth as Appendix A charges appellant with impersonation of an agent of the Federal Bureau of Investigation, in violation of Title 18, United States Code, Section 912. Appellant was tried before a jury on September 25, 26 and 27, 1962, and a verdict of guilty was returned. [C. T. 16.][1] On October 5, 1962, appellant was sentenced to three years imprisonment and execution of sentence was suspended and defendant placed on probation for a period of five years. [C. T. 20.] Appellant filed a timely notice of appeal. [C. T. 22.]

III.
ERROR SPECIFIED.

Appellant has in effect specified the following points on appeal:

1. The evidence is insufficient to support a conviction.
2. The trial court erred in its instructions, "which resulted in prejudice to the appellant."
3. The trial court erred in admitting evidence of prior similar acts of appellant.

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[1]C. T. refers to Clerk's Transcript of Record.

IV.

STATEMENT OF FACTS.

Government's Case in Chief.

Robert Reedy testified that he was living at 1001 Euclid Avenue, San Diego, California, on March 13, 1962, when he answered the door of his residence about noon and observed the appellant who asked him if this was where Mr. Durbin lived. [R. T. 5, 6.][2] Upon being advised by Reedy that Mr. Durbin was not there the appellant stated that he was "a special investigator." [R. T. 6.] Reedy asked what it was that Whaley wanted and if he had come about the car of Reedy's father-in-law, John Durbin, whereupon, appellant stated that he hadn't come about repossession of the car and asked Reedy if he knew where he could get ahold of Mr. Durbin. [R. T. 6, 7.] Reedy then told Whaley that he didn't know where Mr. Durbin was, "but that even if I did know, that I wouldn't tell him regardless." [R. T. 7.] Mr. Reedy then left the door and his wife came to the door and Mr. Reedy heard her tell the appellant to come in, that she would discuss the matter further but that she wouldn't guarantee that she could tell him anything. [R. T. 7.] Appellant then entered the house and all three parties sat in the front room, at which time appellant asked Mr. Reedy if he knew it was a Federal crime to transport a car across the State line. Mr. Reedy responded by stating that the place where Mr. Durbin bought the car knew that Durbin worked for the Federal Government. [R. T. 7, 8.] Appellant then stated that the place where Durbin had

[2]R. T. refers to Reporter's Transcript of Proceedings.

bought the car "had turned the matter over to us," whereupon, Mr. Reedy asked Whaley for his credentials and the appellant handed Reedy a leather folder in which he observed a gold badge, the details of which he did not remember, and a card about 2½ inches wide by 3½ inches in which Whaley's picture appeared in the lower left hand corner. The card also had Whaley's name, address, height, color of eyes, typed in and at the bottom of the card it had "Federal Bureau of Investigation." [R. T. 9, 10.] Exhibit 1 was identified as being similar in size but not being the card which the witness was shown by appellant. While Reedy had the card in his hands he told his wife that "The gentleman was from the FBI and that we might as well tell him, because regardless he was going to find out." Appellant said nothing in response to that statement. Appellant prior to this time had asked Reedy if he and his wife knew they could get into trouble by withholding information. [R. T. 12.] Mrs. Reedy then took from her husband the folder presented by Whaley, looked at the contents, returned same to Whaley and then left the room and obtained a letter which had Durbin's post office box address on it which she then related to appellant. [R. T. 12, 13.]

Upon obtaining this information appellant left and as he was leaving Mrs. Reedy asked how he would contact Durbin, in answer to which Whaley said "they" would send him a telegram and have him get in touch with "our" office, adding that by the time "we" get in touch with people in cases like this "the charges are dropped." [R. T. 12, 13.] At the time Mr. Reedy requested his wife to obtain this information for ap-

pellant, Reedy believed Whaley to be an FBI agent and would not have requested or allowed this information to be given had he not held this belief. [R. T. 14.]

On cross-examination Reedy stated he first felt appellant was a private detective and that he was there for the purpose of repossessing Mr. Durbin's car, but that after appellant stated he was not there about repossessing the car Reedy allowed his wife to invite appellant into their home to find out what it was all about. [R. T. 17-19, 21, 22.] Reedy reiterated that after entry into their home appellant asked if Reedy and his wife knew it was a Federal crime to transport a car across the State line without permission from the owners; that one could get into trouble for withholding information, and that Whaley had said nothing about the legal title holder repossessing the car. [R. T. 24, 25, 28.]

Mrs. Roberta Reedy was at her residence on March 13, 1962, when she went to the door of her house where her husband was conversing with appellant about her father, John Durbin. [R. T. 68, 69.] She remained at the front door with the appellant after her husband left the door, about to close it when appellant displayed a badge and she let him in. [R. T. 69.] Mrs. Reedy thereafter examined a folder in her house produced by appellant after he entered and heard her husband state that appellant was an FBI agent. [R. T. 69.] Appellant stated that Mrs. Reedy had better tell him what he wanted to know or they would get into trouble; they talked the situation over and thereafter she found a letter with her father's post office address on it and gave it to appellant believing at that time

that he was an agent of the FBI, which information she would not have given him had she not held that belief. [R. T. 70.]

On cross-examination Mrs. Reedy stated that she observed the folder which Mr. Whaley had shown her husband and saw a card. [R. T. 73.] All she remembered on the badge was big print saying detective and she recalled that the card was about three inches by three inches with appellant's picture in the lower left hand corner, but she did not recall the wording on the card. [R. T. 74, 75.] She stated that the card which appellant had shown her was different than the card [Ex. 1] later found in appellant's possession. [R. T. 52, 75.] Mrs. Reedy testified that Mr. Whaley stated that her father had taken the car out of the State of Oregon, that it was a crime and he Whaley had been assigned to the case. [R. T. 85.] On redirect examination she testified that after she heard her husband say that appellant was an FBI agent she did not hear the defendant say anything as to whether he was or was not an FBI agent. [R. T. 90.]

A letter [Ex. 6] *re* John J. Durbin dated March 13, 1962, was mailed from appellant to the United States National Bank, Eugene, Oregon, together with an invoice [Ex. 7] entitled Pacific Coast Adjusters to said bank in the sum of $15.00. A check [Ex. 8] in the amount of $15.00 was issued by said bank to Pacific Coast Claim Adjusters which was cashed in the due course of business. [R. T. 145, 146, 147.] The letter [Ex. 6] over the name Jack Whaley included among other things the information that Durbin had not been in San Diego since Christmas of 1961; that Durbin

worked for the U. S. Bureau of Land Management, normally out of the Portland office; that Durbin told his daughter he as going to be working out of Sacramento, and that Durbin's "daughter forwards mail to subject to Post Office Box No. 734 in Marysville, California."

Special Agent Lawrence Feldhaus of the Federal Bureau of Investigation saw appellant at latter's office in San Diego, on June 27, 1962, at which time appellant said he couldn't remember seeing the Reedys on the previous March 13, or, after looking through his files, remember any case on John C. Durbin. [R. T. 39-41.] Agent Feldhaus then asked what identification appellant was carrying at that time and Whaley produced a business card bearing the initials "NBI" stating he could not recall what he had carried on the previous particular occasion because he worked under several different names for several different companies and had used the names of Dealer's Adjustment Bureau, Pacific Coast Claims Adjusters, as well as the National Bureau of Investigation. [R. T. 41-43.] Agent Feldhaus asked Whaley if he still had the badge which he used to carry, and appellant advised that a California Court decision in January made it illegal for repossessors to carry a badge in repossessing an automobile and that he no longer carried that badge, that he thought the badge was home but didn't know where it was and declined to make it available for viewing. [R. T. 43, 44.] When Whaley was asked about carrying a yellow identification card in a badge holder with his badge, he stated he had carried this on occasions, but that he didn't have it with him now, and didn't know just exactly where it was. [R. T. 44.] Ap-

pellant produced a blank yellow card which he said was just like his except that "his was filled out and had a picture on it." [R. T. 44.] This card appeared the same as Exhibit 1 without the typing and picture. [R. T. 45.] Agent Feldhaus exhibited his credentials to appellant who stated the credentials which he had carried were similar to those carried by Agent Feldhaus in size and that they opened in the same way with a badge on one side, a piece of felt in the middle, and the identification card on the other side. [R. T. 46, 47.]

Agent Feldhaus arrested the defendant on June 29, 1962, at his office, 2240 University Avenue, San Diego, at which time appellant stated that he had received the file from Los Angeles on the John Durbin case, that it refreshed his memory and he was the one who had gone to see Mr. and Mrs. Reedy. [R. T. 49, 50.] At the time of his arrest appellant was carrying four cards [Exs. 1 to 4, incl.], Exhibit 2 bearing the large initials NBI. [R. T. 50-53.] On cross-examination Agent Feldhaus stated that he found Government's Exhibit 1, an identification card with appellant's picture and description and the words, National Bureau of Investigation, thereon, but did not find any card with the words, Federal Bureau of Investigation, on it. [R. T. 64.]

Frank Flores Gonzales testified that he was living at 345 South Euclid, San Diego, about August 30, 1961, while there was a boat parked outside the house apartments in which he was living. [R. T. 93, 94.] Gonzales heard a noise in the night outside his house, went outside and saw appellant standing beside an all black two-door Ford sedan to which the boat was then at-

tached. [R. T. 94, 95.] Gonzales went outside and asked appellant what he was doing and appellant told another man who was in the black car to "take off" at which time the other man drove off in the automobile with the boat. [R. T. 96.] Appellant then told Gonzales that he had come to repossess the boat. During this time Gonzales asked appellant who he was. Appellant stated he was from the Federal Bureau of Investigation. Gonzales testified he didn't understand what that meant and asked appellant what it meant, and then appellant stated that he was from the FBI. [R. T. 96, 97.] Gonzales asked Whaley to identify himself, whereupon Whaley opened his sport coat, took two steps back and "flashed" a white business card the reading on which Gonzales could not make out. Whaley was then asked to wait as Gonzales stated that he was going to call the police, but the appellant left the area at that time. [R. T. 98, 99.]

Haleen A. Williams testified he was at his brother's residence in San Diego on January 11, 1962, at which time he had his 1962 Thunderbird automobile parked outside that house when he observed the hood to his vehicle up and a black 1952 Ford two-door sedan with what he thought was a police antenna at the rear left of the bumper, parked in front of his automobile. [R. T. 116, 117.] Williams went outside with his brother and others and saw Whaley standing to the left rear side of his automobile, and inquired what was going on to which Whaley stated, "Who is Williams?" When the witness told Whaley he was Williams, Whaley flashed a badge at him and told him, "National City Police." [R. T. 118.] Whaley also stated at the time, "This car is being repossessed." Williams described

the badge as being gold in color and about the average size that the National City Police wear and that the manner in which Whaley showed the badge to him was by taking out a billfold and showing him the badge on which appeared the word, National, with Whaley's thumb covering the rest of the badge. [R. T. 119.] Williams asked Whaley, "What does the National City Police have to do in San Diego, and acting as an agent for a repossession outfit?" Williams then asked his brother-in-law to call the San Diego Police and requested Whaley not to move from the area; however, Mr. Whaley gave a signal to the man in the car and he drove off with Williams' car. [R. T. 120, 121.]

Defense.

Appellant testified that he was a private investigator or repossesser and that on March 13, 1962, he went to the house of the Reedys to locate or repossess a 1955 Plymouth from Mr. John J. Durbin who was represented to be the father of Mrs. Reedy. [R. T. 195, 196.] Appellant stated that Mrs. Reedy answered the door; that he identified himself by name as a special investigator with Pacific Coast Claims Adjusters and stated he was trying to locate John J. Durbin on instructions from the U. S. National Bank to locate him regarding the status of the account and to either bring the account current or repossess the automobile. [R. T. 197.] He said that Mr. Reedy then came to that door and he didn't recall which of the Reedys invited him in, but that he did not show Mrs. Reedy a badge before entering; instead he showed them the identification card which he claimed was Exhibit 1 and a badge [Ex. A] after entering their house. [R. T. 198, 199.] Appellant denied that he had identification on

him which stated he was a member of the Federal Bureau of Investigation. [R. T. 199, 200.] Whaley stated that after Mr. Reedy and then Mrs. Reedy looked at Whaley's badge holder and "I.D. card," Mr. Reedy then said, "You might as well tell him. They are going to find out anyhow." [R. T. 200, 201.] Mrs. Reedy then went and got an envelope which had the return address of a post office box in Marysville which she handed appellant, and Mr. Reedy then said to his wife, "Honey, you had to tell him. He is from the FBI." [R. T. 201.] Appellant stated he then thanked them and left, after which he submitted the information he had acquired to the U. S. National Bank in Oregon, for which his company received $15.00 of which he received $9.00. [R. T. 201, 202.]

Appellant stated he did not remember anything regarding the visit to the Reedys at the time of Agent Feldhaus' first interview and checked the file to see if it (Durbin case) had been closed and sent to Los Angeles and found it had been. [R. T. 204.] Appellant denied getting rid of identification bearing the name "Federal Bureau of Investigation" or "FBI." [R. T. 208.] Appellant also denied identifying himself to Williams as being a member of the National City Police Department on the occasion of repossessing Williams' Thunderbird automobile. [R. T. 209, 210.] Appellant stated that he told the three men who had appeared at the repossession of the boat and trailer that he was repossessing the boat "on behalf of the Morris Plan Company" and that his name was Whaley with the "National Bureau of Investigation." [R. T. 215.] Appellant denied he told the Reedys that it was a Federal offense to take mortgaged property across the

State line, and denied that he intended to pretend to be an agent of the Federal Bureau of Investigation for the purpose of obtaining information from the Reedys concerning the location of John Durbin. [R. T. 218.]

On cross-examination appellant admitted using the all black Ford when he went to the Williams and Gonzales places. [R. T. 220.] Appellant testified he was unable to recall the conversation with the Reedys when Agent Feldhaus first asked him about it, although admitting shortly after he left the Reedys on March 13, 1962, he caused to be typed and mailed a letter concerning the information obtained from them to the U. S. National Bank in Oregon. [Ex. 6; R. T. 226, 227.]

Carl Curtis Boler testified that he was a private detective and that the name of his company was National Bureau of Investigation, a registered company which had used that name since 1935, and had used an identification card since that time; that said identification was identical to Exhibit 1 and was the identification supposed to be used by Mr. Whaley who had been with him for about seven years, as well as the others in the company. [R. T. 164-170.]

Andrew Nossal testified he was the one who drove off Williams' Thunderbird and that at the times he was present at the scene he did not hear appellant inform Williams that he, Whaley, was a member of the National City Police Department. [R. T. 160.] On cross-examination Nossal testified that he was not present during the entire conversation that Williams had with Whaley and that the black Ford was similar to automobiles driven by the Detective Division of the Police Department.

Eugene B. Swartwood testified he was employed by appellant and worked for the National Bureau of Investigation; that he was present during most of the period that Whaley was talking to Williams and that he never heard Whaley state he was a member of the National City Police Department to Williams. [R. T. 176-177, 194.] Swartwood stated that he was present the night that the boat and trailer were repossessed and that Whaley stated to Gonzales and the others that he was Mr. Whaley of the National Bureau of Investigation. [R. T. 184.] Swartwood stated further that on the occasion of the Williams and Gonzales matters, Whaley used the black two-door sedan. [R. T. 183.]

Carl Rosenthal, the co-owner of Pacific Coast Claim Adjusters testified he was present at the time that the boat and trailer were repossessed and that appellant identified himself to the three people (Gonzales and two others) who came out of the house as Jack Whaley representing the Morris Plan Company, but that he did not hear him say "National Bureau of Investigation" or "Federal Bureau of Investigation." [R. T. 185, 186, 189, 190.]

Reilly P. Stearns, James R. Clifton and Frank C. Cross testified that the reputation of appellant for truth, honesty and integrity and as a law abiding citizen was good. [R. T. 140, 173, 194.]

V.

ARGUMENT.

A. The Evidence Amply Supports the Jury's Verdict of Guilty.

A conviction should be sustained on appeal if there is substantial evidence, taking the view most favorable to the government to support it. In considering the facts the reviewing court must grant every reasonable intendment in favor of appellee.

United States v. Glasser, 315 U. S. 60, 80 (1942);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir. 1956), Cert. Den. 350 U. S. 954 (1956);

Bolen v. United States, 303 F. 2d 870, 874 (9th Cir. 1962).

The evidence shows that appellant came to the house of the Reedys in San Diego on March 13, 1962, for the purpose of obtaining information concerning the location of Mrs. Reedy's father. When he was not first admitted after stating that he was a special investigator and upon disclaiming that he had come about repossession of Durbin's automobile, he persisted by displaying a badge to Mrs. Reedy. After entry into the house was thus gained, appellant referred to possible Federal criminal charges involving Durbin and the trouble which could result from withholding information from "us." Appellant then produced identification which led the Reedys to believe the "us" to be the Federal Bureau of Investigation. It was after the statements and the production of the identification card that the Reedys became convinced that appellant was

from the FBI, and then furnished the information sought. This information was immediately thereafter relayed by appellant to the bank in Oregon and appellant later received compensation pursuant to his letter and bill.

The appellant claims that at no time did he represent orally that he was an agent of the Federal Bureau of Investigation and stresses that

> "the only witness from whom the only bit of testimony that the prosecution presented, was Mr. Reedy, who stated that he saw appellant's identification card bearing the words 'Federal Bureau of Investigation.' "

The testimony of Mr. Reedy was of itself, of course, very substantial evidence of the representation made by appellant. There was additionally the testimony of both Reedys that Mr. Reedy made the statement before any information concerning Durbin's location was furnished that the appellant "was from the FBI" and that they might as well provide the information because regardless he was going to find out. This statement was made after appellant had represented along other things that the charges had been referred to "us," that transporting a car across State lines without the owner's permission was a "federal" crime, and that the Reedys could get into "trouble" if they withheld information.

There is also the testimony of both Reedys that they believed appellant was in fact and FBI agent and that the information would not have been furnished had that belief not been so held by them. The fact that the card testified to by Mr. Reedy was not later found or

specifically asked for by Agent Feldhaus is not significant, particularly since at the time the agent first went to see the appellant the latter did not produce any executed credentials and disclaimed remembering the incident at all even though he had detailed the information received from the Reedys in a letter written very shortly thereafter and for which he later received compensation.

It is submitted that the evidence viewed in its correct light amply supports the verdict of guilty as charged.

B. The Trial Court Did Not Err in Its Instructions.

Although Rule 30, Federal Rules of Criminal Procedure, provides for the submission of instructions by a defendant and the stating distinctly to the trial court of the matter to which he objects, the appellant broadly and without any showing that such contention was properly made below asserts only that the instructions "resulted in prejudice to the appellant."

Appellant first claims at page 6 of his brief that the trial court "distinctly implies intention and motive to be one and the same thing." Appellant quotes a portion of the instructions at Reporter's Transcript, pages 246 and 247, lines 16 through 20, and lines 15 through 19, respectively, yet fails to include the following instructions at page 247, lines 8 through 10:

> "Now, intent and motive are never to be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which an act is done or omitted."

It is clear from the reading of the instructions on intent as a whole set forth in Appendix B [R. T. p. 246, line 6, to p. 247, line 18, inclusive] hereto, that there is no merit to this contention.

Next, appellant claims that the instructions set forth as Appendix C hereto, are ambiguous and "not the law," apparently basing this alleged error on the contention that "the appellant certainly had no duty to inform the prosecution witness Reedy in the light of all the circumstances that he was not from the Federal Bureau of Investigation."

The case to which appellant apparently refers in support of this proposition is *Massengale v. United States,* 240 F. 2d 781 (6th Cir. 1957), cert. denied June 10, 1957, 354 U. S. 909. In this case defendant was an employee of the Federal Detective Bureau, Inc., and the Court of Appeals for the Sixth Circuit in reversing the District Court on impersonation count stated that there was no evidence presented that defendant at any point declared himself to be an agent of the Federal Bureau of Investigation or that defendant assumed or pretended to be an officer or employee acting under the authority of the United States. The badge worn by defendant bore the words "Federal Detective Bureau, Inc.," and he gave the witness to whom he had stated that he was from the "Federal Bureau" a phone number which was that of the Federal Detective Bureau where he was later promptly located.

The Sixth Circuit's decision turned upon an issue of sufficiency of evidence in which the facts were obviously far short of the series of actions by appellant in this case. But neither the facts in the *Massengale*

case nor appellant's version of the facts in this case can serve as a foundation for his proposition that the instructions given were not the law. As was stated in *Pierce v. United States,* 86 F. 2d 949 (6th Cir. 1936), at 951 concerning a similar charge under former Section 76 of Title 18, where a contention was made that the testimony was intrinsically destitute of a probative value as a basis of a finding of false impersonation:

> "Likewise must be rejected the contention that the representations if made were too absurd and irrational to constitute a false pretense, and that to come within the statute they must be such as would be calculated to deceive persons of ordinary intelligence in the absence of a showing that they were addressed to illiterates or those of subnormal mental capacity. We find nothing in the statute that confines its prohibitions to those representations or pretenses which are sufficiently convincing to deceive only those least gullible. Indeed, the purpose of the statute is broader than mere protection of the credulous. As was said in United States v. Barnow (239 U. S. 74), *supra:*
>
> 'In order that the vast and complicated operations of the government of the United States shall be carried on successfully and with a minimum of friction and obstruction, it is important—or, at least, Congress reasonably might so consider it—not only that the authority of the governmental officers and employees be respected in particular cases, but that a spirit of respect and good will for the government and its officers shall generally prevail. And what could more directly impair this spirit than to permit unauthorized and unscrupulous

persons to go about the country falsely assuming, for fraudulent purposes, to be entitled to the respect and credit due to an officer of the government? It is the false pretense of Federal authority that is the mischief to be cured.' "

See also:

United States v. Lepowitch, 1943, 318 U. S. 702, 704.

As a final matter alleged as error, appellant contends that the Court's instructions in response to an inquiry by the jury, which instructions appellant does not detail in his brief, were "so ambiguous that it cannot be seen by appellant how the jury had any basis on which to arrive at a conclusion." But it is plain from a reading of the final paragraph of the instructions given by the trial court [R. T. 266, 267], to which appellant then appeared satisfied, that the instructions were crystal clear in response to the question concerning false pretenses made by the jury:

"But the question in your minds, the crucial thing is, when was there any false pretense, if there was? When did the defendant, with guilty intent, create that impression, if he did? He might not have created it with a guilty mind at all. But in order to be guilty of this crime, he must have the guilty state of mind in endeavoring to get the thing of value, namely, the information. He must have the criminal intent at that time, at the time he seeks the information, and gets that information. That's the crucial time. And that is what I wanted to emphasize."

C. The Trial Court Did Not Err in Admitting Evidence of Prior Similar Acts.

The appellant contends, without citing authorities, that the evidence of his representing to Gonzales about August 30, 1961, that he was from the "FBI" and his representing to Williams on January 11, 1962, that he was a National City Policeman, in connection with the repossessions there involved was "remote, prejudicial incompetent, irrelevant and immaterial." It has been well established that such evidence is admissible for the purpose of showing intent and state of mind of appellant concerning the offense charged; and the court so instructed the jury in this case at the time of the receipt of the Gonzales and Williams testimony and again in its final instructions. [R. T. 99-101; 116; 248, 249.]

> *Nye & Nissen v. United States,* 1949, 336 U. S. 613, 618;
>
> *Massei v. United States* (1 Cir., 1957), 241 F. 2d 895;
>
> *Harper v. United States* (D. C. Cir. 1956), 239 F. 2d 945;
>
> *Enriquez v. United States* (9 Cir. 1951), 188 F. 2d 313;
>
> *Allen v. United States* (6th Cir. 1961), 289 F. 2d 235, 236.

VI.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the jury verdict of guilty in the court below should be affirmed.

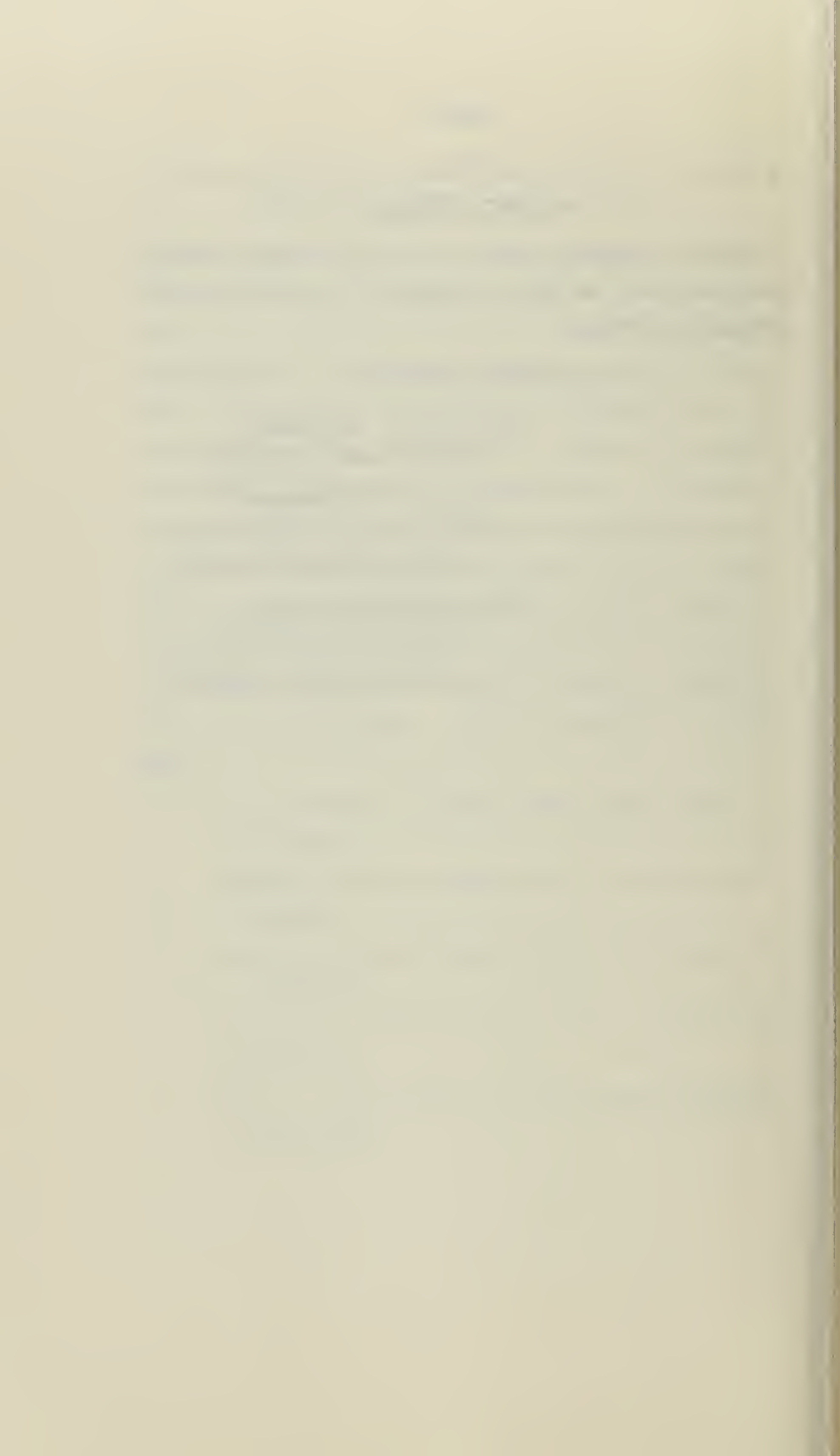
Respectfully submitted,

Francis C. Whelan,
United States Attorney,

Thomas R. Sheridan,
Assistant U. S. Attorney,
Chief, Criminal Section,

Elmer Enstrom, Jr.,
Assistant U. S. Attorney,

Attorneys for Appellee.



Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ELMER ENSTROM, JR.,
Assistant United States Attorney.

APPENDIX "A."

In the United States District Court in and for the Southern District of California, Southern Division.

July, 1962, Grand Jury—Southern Division.

United States of America, Plaintiff, vs. John William Whaley, Defendant. No. 30993-SD

Indictment (U.S.C., Title 18, Section 912—Impersonation of Federal Officer).

The Grand Jury charges:

On or about March 13, 1962, in San Diego County, within the Southern Division of the Southern District of California, defendant John William Whaley did falsely pretend to be an officer and employee of the United States, to wit: an agent of the Federal Bureau of Investigation, and in such pretended character obtained from Robert Reedy and Roberta Catherine Reedy a thing of value, to wit: information concerning the address and location of one John Durbin.

A True Bill

....

Foreman

FRANCIS C. WHELAN,
United States Attorney

APPENDIX "B."

[R. T. p. 246, line 6, to p. 247, line 18, incl.]

In every crime there must exist a union or joint operation of act and intent.

The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

With respect to major crimes, such as charged in this case, specific criminal intent must be proved before there can be a conviction.

Specific criminal intent, as the term itself suggests, requires more than a mere general intent to engage in certain conduct.

A person who knowingly does an act which the law forbids, or who knowingly fails to do an act which the law requires to be done, intending with bad purpose either to disobey or disregard the law, may be found to act with specific criminal intent.

An act or failure to act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason.

It is not necessary for the prosecution to prove knowledge of the accused that a partuclar act or failure to act is a violation of law. Unless and until outweighed by evidence to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done. However, evidence that the accused acted or failed to act because of ignorance of

the law may be considered in determining whether or not the accused acted or failed to act with specific criminal intent as charged.

Now, intent and motive are never to be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which an act is done or omitted.

Personal advancement and financial gain are two well-recognized motives for much of human conduct. These laudable motives may prompt one person to voluntary acts of good, another to voluntary acts of crime.

So good motive alone is never a defense where the act done or omitted is a crime. Motive of the accused is immaterial indeed except insofar as evidence of motive may aid determination of intent or state of mind.

APPENDIX "C."

[R. T. p. 251, lines 10 to 24, incl.]

The statute is aimed against false pretense of any office or employment under the United States. Thus it is of no consequence whether the pretender names an existing or a nonexisting office or officer, or fails to name, describe or designate accurately the pretended office or employment.

The statute is intended not only to protect innocent persons from actual loss through reliance upon false assumptions of Federal Authority, but also to maintain the good repute and dignity of the Federal Service itself.

It is no defense to asset that a reasonable person should not have been deceived by the false pretense. The object of the statute is to safeguard the respect due the authority of Federal officers from the most gullible as well as the least credulous.